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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1983

NO. \_\_\_\_\_

ORISON F. McDONALD, II  
AND  
HERBERT DARRELL BOMAR,  
Petitioners,

VS.

BILL BURROWS, SHERIFF OF WICHITA  
COUNTY, TEXAS; THE STATE OF TEXAS; AND  
THE STATE OF MINNESOTA,  
Respondents

PETITION FOR A WRIT OF  
CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FIFTH CIRCUIT

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DATE: JULY 3, 1984

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## QUESTIONS PRESENTED FOR REVIEW

1. May an asylum state court deny extradition due to the bad faith motive of the demanding state's prosecutor in seeking extradition to assist collection of private debts in contravention of the alleged fugitive's constitutionally protected right of effective access to judicial process?

2. May an asylum state court deny extradition due to the failure of the asylum state to accord due process to the alleged fugitive?





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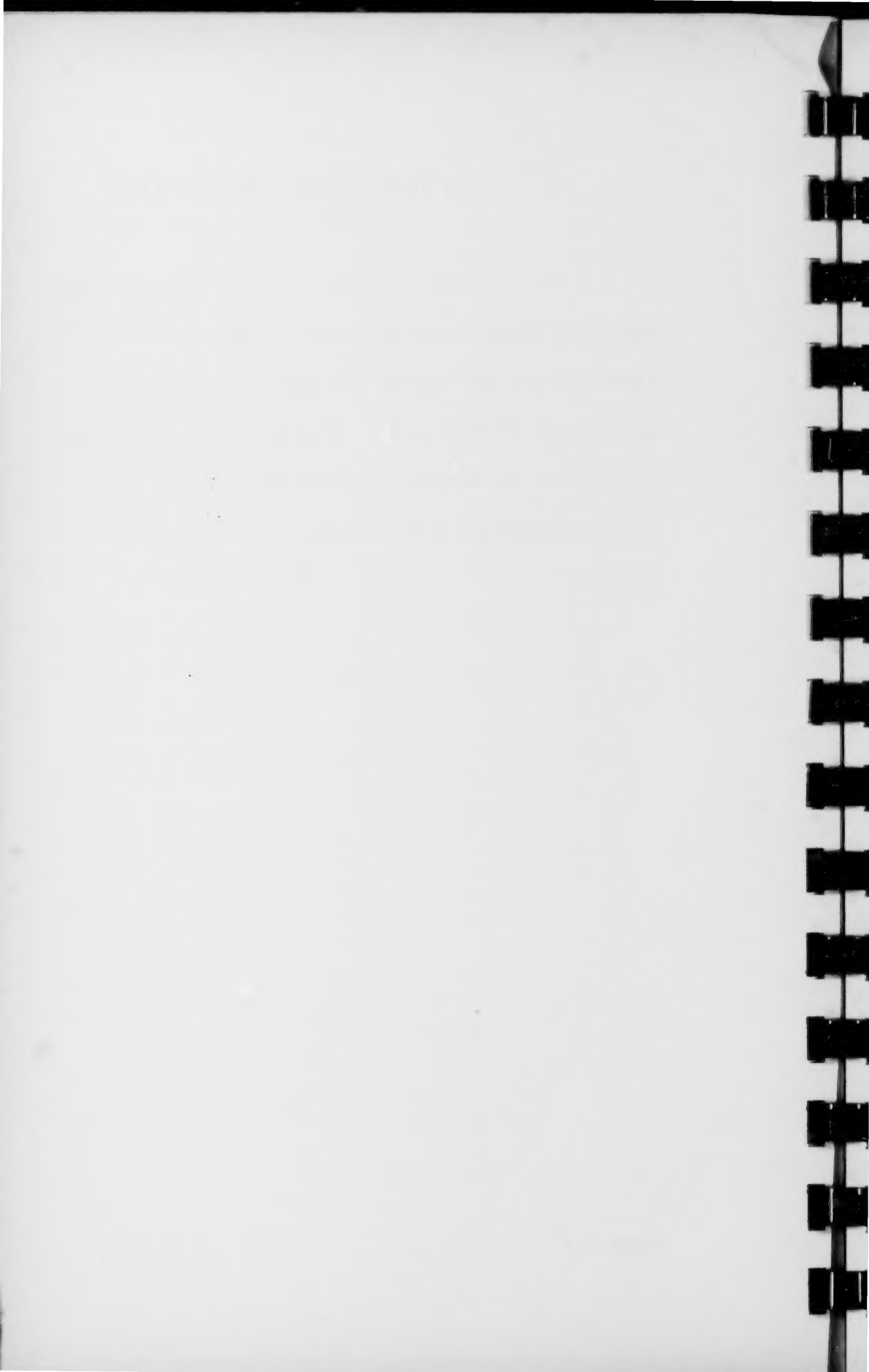
The opinion from the United States Court of Appeals for the Fifth Circuit is reported at 731 F.2d 294 (5th Cir. 1984). (See Appendix A). The opinions from the United States District Court for the Northern District of Texas was not published. (See Appendix B and C). The opinion from the Court of Appeals for the Second Supreme Judicial District of Texas is reported at 631 S.W.2d 222 (Tex. Ct. App. - Ft. Worth 1982, pet. for disc. rev. ref'd.) (See Appendix D). The opinion from the 78th District Court of Wichita County, Texas was not published. (See Appendix E).



## STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on May 7, 1984.

This Petition for Certiorari was filed within sixty days of that date. The Supreme Court has jurisdiction to review the case on petition for writ of certiorari pursuant to 28 U.S.C., Sec. 1254(1).



### APPLICATION FOR STAY

Petitioners have previously filed an Application For Recall and Stay of Mandate and Stay of Extradition Order of the United States Court of Appeals for the Fifth Circuit which was denied on June 19, 1984 by Justice White. (See Appendix F). Should the Court or a justice thereof believe that the consideration presented herein warrant the stay pending granting or denial of certorari, a stay should be immediately entered to avoid the possibility of mootness due to the extradition of Petitioners.





## CONSTITUTIONAL AND STATUTORY PROVISIONS

### Constitution

#### Article IV, Section 2, Clause 1

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

#### Article IV, Section 2, Clause 2

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

### First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.



### Sixth Amendment

In all criminal proceedings, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

### Fourteenth Amendment

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due



process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

#### FEDERAL STATUTES

18 U.S.C., Sec. 3182: Fugitives from State or Territory to State, District or Territory.

Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority, from any State, District or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, the executive authority of the State, District or Territory to which such person has fled shall cause him to be arrested and secured, and notify the executive authority making such demand, or the agent of such



authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within thirty days from the time of the arrest, the prisoner may be discharged.

#### STATE STATUTES

Minn. Stat. Ann., Vol. 41, Sec. 629.23(1):

When the return to this state of a person charged with crime in this state is required, the prosecuting attorney shall present to the governor his written application for a requisition for the return of the person charged, in which application shall be stated the name of the person so charged, the crime charged against him, the approximate time, place, and circumstances of its commission, the state in which he is believed to be, including the location of the accused therein at the time the application is made, and certifying that, in the opinion of the prosecuting attorney, the ends of justice require the





arrest and return of the accused to this state for trial and that the proceeding is not instituted to enforce a private claim. [emphasis added].

Tex. Code Crim. Pro. Ann., Art. 51.13, Sec. 23(1):

When the return to this State of a person charged with crime in this State is required, the State's attorney shall present to the Governor his written motion for a requisition for the return of the person charged, in which motion shall be stated the name of the person so charged, the crime charged against him, the approximate time, place and circumstances of its commission, the State in which he is believed to be, including the location of the accused therein at the time the motion is made and certifying that, in the opinion of the said State's attorney the ends of justice require the arrest and return of the accused to this State for trial and



that the proceeding is not instituted to  
enforce a private claim. [emphasis added].



## STATEMENT OF THE CASE

This is an interstate extradition case. On March 31, 1981, Petitioners were arrested in Wichita County, Texas on a fugitive warrant originating from a complaint and information filed by an Assistant County Attorney in Ramsey County, Minnesota. Petitioner Orison F. McDonald, II is a resident of Wichita County, Texas. Petitioner Hebert Darrell Bomar is a resident of Dallas County, Texas. The Minnesota complaint alleged violations of Minnesota security laws in the sale of oil and gas working interest to a number of Minnesota investors. The Petitioners were discharged from the fugitive warrant on August 31, 1981 because no governor's warrant had been issued for their extradition. Petitioners were arrested again in Wichita County, Texas on October 23, 1981 pursuant to a warrant issued by the Texas governor on October 16, 1981.



Petitioners filed a petition for a writ of habeas corpus in the 78th District Court of Wichita County, Texas on October 23, 1981. Petitioners were not granted a hearing on their petition for a writ of habeas corpus until December 11, 1981. At this hearing, Petitioners introduced uncontroverted evidence which showed that the motive of the State of Minnesota in seeking Petitioners' extradition was to assist private citizens in Minnesota in the collection of their personal debts. The 78th District Court of Wichita County, Texas granted the State of Minnesota's extradition request on January 11, 1982.

The Court of Appeals for the Second Supreme Judicial District of Texas affirmed the District Court's judgment on March 24, 1982. Ex Parte McDonald, 631 S.W.2d 222 (Tex. Ct. App. 1982). The Texas Court of Criminal Appeals refused Petitioners' petition for discretionary review on June 16, 1982 and denied Petitioners' motion for





rehearing on petition for discretionary review on September 15, 1982. Petitioners' Petition for Writ of Certiorari was denied by the United States Supreme Court on February 22, 1983.

McDonald v. Texas, 103 S.Ct. 1193, 75 L.Ed 2d 438 (1983) (no. 82-987).

Petitioners sought habeas corpus relief in the United States District Court for the Northern District of Texas, Wichita Falls Division. Contemporaneous with the filing of the federal writ of habeas corpus, Petitioner McDonald, who is a debtor in possession pursuant to chapter 11 of the Bankruptcy Code, filed actions in the United States Bankruptcy Court seeking an injunction against extradition and further criminal proceedings. The Bankruptcy Court actions were transferred to the U.S. District Court, Northern District of Texas and consolidated with the writ of habeas corpus. The District Court denied habeas corpus relief. On appeal, the United States Court of Appeals for the Fifth Circuit



affirmed the opinion of the District Court on May 7, 1984.

It has been Petitioners' contention that the extradition is sought to assist private citizens in their personal lawsuits. In late 1980 and early 1981, 57 Minnesota citizens filed suit in the United States District Court for Minnesota seeking millions of dollars in damages for alleged violations of federal and Minnesota security laws. Without trial, the District Court granted judgment against Petitioner McDonald for the sum of \$3,270,292.78. The judgment against McDonald is currently pending before the United States Court of Appeals for the Eighth Circuit.



PRESENTMENT OF FEDERAL QUESTIONS  
IN LOWER COURTS

Question Presented For Review Number One, which involves effective access to legal process, was first raised before the United States Bankruptcy Court for the Northern District of Texas, Wichita Falls Division in Petitioner McDonald's Adversary Complaint to Enjoin Extradition and Criminal Prosecution Under 11 U.S.C. 105; 28 U.S.C. 1481 and 28 U.S.C. 1651. Upon transfer, the District Court ruled that the doctrine of federal abstention promulgated in Younger v. Harris, 401 U.S. 37 (1971) required that the injunction be denied.

Upon appeal to the Fifth Circuit, Question Presented For Review Number One was presented in Issue Number Six of Appellants' Brief. The Fifth Circuit denied relief citing the doctrine of federal abstention, and further, that Petitioner has no federally protected right to have his



debts administered by the bankruptcy court.  
(App<sup>1</sup>: A-10 to A-12).

Question Presented For Review Number Two, which involves due process rights in the asylum state, was first presented to the 78th District Court of Wichita County, Texas in Defendants' Motion to Quash or Dismiss Extradition filed November 25, 1981. (Tr.<sup>2</sup> pp. 133-134; pp. 141-142). The 78th District Court in its Judgment stated that "such constitutional grounds as alleged have not been violated, but have been handled in compliance with the requirements of such clauses, and such motion is hereby denied. (Tr. p. 174).

On appeal to the Texas Court of Appeals, Petitioners presented Question Two in Ground of Error 5. The Texas Court of Appeals held that

<sup>1</sup> "App." refers to the Appendix, which due to its size has been filed as a separate document.

<sup>2</sup> "Tr" refers to the Transcript of pleadings filed in the 78th District Court of Wichita County, Texas and is part of the state court records.





the Texas Speedy Trial Act is inapplicable to extradition proceedings.<sup>3</sup>

On Petition For Discretionary Review to the Texas Court of Criminal Appeals, Petitioners presented Question Two in Ground of Review No. 2. The Texas Court of Criminal Appeals did not grant discretionary review; thus, no opinion was issued on Question Two.

On Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C., Section 2241 to the United States District Court, Question Two was presented as Ground Two (B) of Unlawful Custody. The United States District Court held that Petitioners' "allegation fails to rise to constitutional dimension".

On appeal to the Fifth Circuit, Question Two was presented as Issue No. 2. The Fifth Circuit held that due process was not a proper

<sup>3</sup> The Texas Court of Appeals completely ignored Petitioners' claim of a right to a speedy hearing pursuant to the United States Constitution.



inquiry in the asylum state, and further, extradition should not be denied due to such because it would penalize the demanding state for the asylum state's wrong.



## REASONS FOR GRANTING CERTIORARI

1. THE DECISION BELOW DENIES PETITIONERS THE RIGHT TO PROTECT THEIR CONSTITUTIONAL RIGHT OF ACCESS TO THE COURTS BY PERMITTING EXTRADITION TO BE USED FOR PRIVATE PURPOSES.

All citizens are guaranteed effective access to judicial process by the Constitution. Access to the courts is a fundamental right protected by three separate provisions of the Constitution. Effective access to the judicial process is protected as a privilege and immunity accorded all citizens. Chambers v. Baltimore & Ohio Railroad, 207 U.S. 142, 148, 52 L.Ed 143, 146 (1907). The right to petition for redress of grievances as provided by the First Amendment guarantees all citizens with effective access to the courts. California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510, 30 L.Ed 2d 642, 646 (1972). The due process clause provides

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all citizens with effective access to the judicial process. Wolff v. McDonnell, 418 U.S. 539, 579, 41 L.Ed 2d 935, 964 (1974).

Bounds v. Smith, 430 U.S. 817, 52 L.Ed 2d 72, 78 (1977). The right of effective access to judicial process is a fundamental right and should not be denied absent compelling reasons. Petitioner McDonald's contention is that Petitioner's constitutionally protected right to judicial process has been wrongfully interfered with by the Minnesota prosecutor in seeking extradition; therefore, Minnesota's extradition request should be denied.

Petitioner McDonald, throughout the extradition proceedings, has contended that the motive of the Minnesota prosecutors in seeking extradition was to assist influential Minnesotans in the collection of their private debts. The 78th District Court of Wichita County, Texas, the only court to provide Petitioners with a factual hearing, found that Petitioners' private claim





evidence was uncontroverted. The necessary inquiries to resolve Petitioner's claim is whether the bad faith motive of the Minnesota prosecutor infringes upon Petitioner's constitutionally protected rights, and if so, whether Petitioner may assert this claim in his extradition proceedings.

Since there can be no question that Petitioner is entitled to effective access to legal process, the first issue is whether institution of criminal proceedings against Petitioner can interfere with Petitioner's access to legal process. Petitioner is not contending that good faith criminal prosecution is interfering with his constitutional rights. It is Petitioner's contention that bad faith criminal prosecution instituted to assist private citizens in the collection of their debts does interfere with Petitioner's constitutional rights.

The power granted to a prosecutor is extensive. The prosecutor has the discretion



whether to investigate an individual's activities for criminal violations. The prosecutor has the discretion whether to institute criminal proceedings against an individual. The prosecutor has the discretion whether to try a criminal case. Criminal prosecution and the threat of criminal prosecution is government's most effective control over the actions of an individual and is for the most part within the exclusive control of the prosecutor.

Although bad faith criminal prosecution may ultimately result in a verdict of acquittal for the wrongfully accused, the wrongfully accused will have suffered great losses due to the bad faith criminal prosecution. The obvious loss to the wrongfully accused is the substantial interference with the accused's daily activities. The accused will suffer the burden of being investigated, preparing for a criminal trial, and participating in a criminal trial. The accused will suffer the economic losses of paying for and



employing defense counsel and the interference with his employment or business. The accused will suffer the suspicions, distrust, and contempt of the community of one being under indictment for criminal charges. The injury to the accused's reputation in the community may injure the accused's business resulting in an additional economic loss. In the extradition context, one will be required to travel to a distant state, obtain living arrangements in the distant state, and defend himself in a distant state. Bad faith criminal prosecution results in substantial injury to the wrongfully accused and is a serious threat which can be used against the accused.

The prosecutor's power to initiate and control prosecution is a powerful weapon which can be used wrongfully against the private citizen. The power of the state vests in the prosecutor. The threat of prosecution is strong leverage which a prosecutor may assert to accomplish his objective.



It is the Petitioners' contention that the objective of the Minnesota prosecutor is to assist private citizens in the collection of their debts. Petitioner McDonald is and has vigorously contested his civil liability to the Minnesota citizens. Before the filing of the criminal complaint, Petitioner McDonald was contacted by several of the Minnesota plaintiffs concerning the collection of the plaintiffs' alleged debts. Petitioner McDonald was informed that, unless he met the Minnesota plaintiffs' demand for payment, criminal prosecution would be initiated against the Petitioners. Upon Petitioner McDonald's failure to pay the alleged debts, criminal proceedings were initiated against Petitioners.

Criminal process has been used to interfere with Petitioner McDonald's right of access to the courts. Petitioner McDonald, as mentioned above, is a defendant in a civil lawsuit in Minnesota federal court. Effective access to judicial





process is not limited to plaintiffs. Defendants are entitled to present their case without undue interference or harrassment from outside sources. As a result of Petitioner McDonald asserting his right of effective access to judicial process, Petitioners have been subjected to undue criminal prosecution and the possibility of extradition.

Petitioner McDonald is asserting his right to effective access to judicial process through the bankruptcy court. Petitioner McDonald is attempting to have his debts, including the contingent debts of the Minnesota Plaintiffs, administered pursuant to the Bankruptcy Code. Criminal process initiated with the intent to assist private citizens in the collection of personal debts would be in contravention of the debtor's right to effective access to the judicial process through the bankruptcy court.

The Minnesota prosecutor is not directly interfering with Petitioner McDonald's access to judicial process; however, indirect interference



with constitutionally protected right is sufficient to warrant federal intervention. United Mine Workers of America v. Illinois State Bar Association, 389 U.S. 217, 19 L.Ed. 2d 426 (1967). In United Mine Workers, the Illinois State Bar sought to enjoin a labor union from employing an attorney to represent its members in workers compensation claims. The Supreme Court held that such an injunction would indirectly interfere with the union member's First Amendment rights and would not be permitted. Id. at 221-225, 19 L.Ed. 2d 430-432. The Minnesota prosecutor's indirect interference with Petitioner McDonald's effective access to judicial process should be sufficient to warrant federal intervention. Bad faith criminal prosecution intended to interfere with access to the courts is interference with a constitutionally protected right.

The second issue to be resolved is whether Petitioners may assert interference with their



constitutionally protected right of effective access to judicial process as a defense to extradition. Traditionally, several states have denied extradition when the demanding state institutes extradition to aid enforcement of a private claim.<sup>1</sup>

<sup>1</sup> State ex rel Nisbett v. Tool, 72 N.W. 53 (Minn. 1897); 72 N.W. 53 (Min. 1897); State ex rel Nemec v. Sheriff of Hennepin County, 181 N.W. 640 (Minn. 1921); State ex rel Fowler v. Langum, Sheriff, 147 N.W. 708 (Minn. 1914) (Minnesota); Ex Parte Offutt, 234 P. 222 (Okla. Crim. App. 1925); Ex Parte Owens, 245 P.2d 68 (Okla. Crim. App. 1926); Ex Parte Maddox, 27 P.2d 171 (Okla. Crim. App. 1933); Ex Parte Johnson, 25 P.2d 1111 (Okla. Crim. App. 1933) (Oklahoma); Hobbs v. State of Tennessee, ex rel (Ala. Ct. App. 1942); Scott v. State, 33 So.2d 390 (Ala. Ct. App. 1948); Stubblefield v. State, 47 So.2d 662 (Ala. Ct. App. 1950); Harris v. State, 82 So.2d 439 (Ala. Ct. App. 1955); Bishop v. State, 92 So.2d 323 (Ala. Ct. App. 1957); (Alabama); State ex rel Hourigan v. Robinson, Sheriff, 257 S.W.2d 9 (Tenn. 1953) (Tennessee); Commonwealth ex rel Spivak v. Heniz, Sheriff, 14 A.2d 875 (Penn. 1940) (Pennsylvania); Work v. Corrigan, 34 Ohio St. 64, 32 Am.Rep. 345 (Ohio); Klaiber v. Frank, 86 A.2d 679 (N.J. 1952) (New Jersey); Ex Parte Kuhns, 137 P.2d 84 (Nev. 1913) (Nevada).



In the case at bar, both the demanding state, Minnesota, and the asylum state, Texas, allow the court to inquire into the motive of the demanding state in seeking extradition. Texas Code of Criminal Procedure Annotated, Art. 51.13, Sec. 23(1) (Texas version of the Uniform Criminal Extradition Act); Ex Parte Bradley, 456 S.W.2d 370 (Tex. Crim. App. 1970); Ex Parte Seffens, 376 S.W.2d 348 (Tex. Crim. App. 1962). Minn. Stat. Ann., Vol. 41, Sec. 23(1); State ex rel Nisbett v. Tool, 72 N.W. 53 (Minn. 1897); State ex rel Nemec v. Sheriff of Hennepin County, 181 N.W. 640 (Minn. 1921); State ex rel Fowler v. Langum, Sheriff, 147 N.W. 708 (Minn. 1914). The policy of these states is clear: Extradition must not be used for private gains. The only method of preventing wrongful use of extradition is to permit the asylum state to inquire into the motives of the demanding state and to deny extradition when extradition is used for private gains.





The lower courts have held that Michigan v. Doran, 439 U.S. 282 (1978) prohibits the asylum state from inquiring into the motive of the demanding state. The Court in Michigan v. Doran was not concerned with the motives of the demanding state. As the Honorable Chief Justice Burger provided, "(w)e granted certiorari to determine whether the courts of an asylum state may nullify the executive grant of extradition on the ground that the demanding state failed to show a factual basis for its charge supported by probable cause." 439 U.S. at 283. The Court in Michigan v. Doran was concerned with the extent of inquiry by the asylum state court into the demanding state's finding of probable cause.

The lower courts, citing Michigan v. Doran, held that, upon the governor's grant of extradition, the asylum state court may only consider the following:



"(a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive."

439 U.S. at 289. The lower courts' position is that constitutional violations arising from the extradition may not be considered in the asylum state court.

The Supreme Court in Michigan v. Doran provided another possible inquiry for the asylum state court; thus, the Supreme Court seemed to be indicating that the above four specific inquiries were not the full extent of asylum state inquiry. In footnote three, the Supreme Court provides:

"In Gerstein we held that 'the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following



arrest'. 420 U.S. at 114, 43 L.Ed 2d 54, 95 S.Ct. 854. Because Arizona provided a judicial determination of probable cause for the arrest warrant, we need not decide whether the criminal charge on which extradition is requested must recite that it was based on a finding of probable cause.

439 U.S. at 285, f.n.3. The Supreme Court was noting that the holding in Michigan v. Doran may not apply to a case where the demanding state did not have a finding of probable cause prior to issuing the fugitive warrant. The footnote indicates that all inquiries into constitutional violations are not precluded by Michigan v. Doran.

Another factor in determining whether Michigan v. Doran precludes inquiry into the motive of the demanding state is whether federal law is exclusive as to extradition. If the holding of Michigan v. Doran does establish all



guidelines for extradition, federal law would be exclusive as to extradition. The United States Supreme Court has held that federal law is not exclusive as to extradition. Innes v. Tobin, 240 U.S. 127, 134-135. As long as the state law does not interfere or conflict with federal law, the state law is constitutional. Id. The federal law on extradition, Article 4, Section 2, Clause 2, of the United States Constitution and 18 U.S.C., Section 3182, does not cover whether a state court may inquire into the motive of the demanding state in requesting extradition; therefore, the asylum state courts should not be denied the opportunity to inquire into the demanding state's motive pursuant to the principle promulgated in Innes v. Tobin.

A possible obstacle to enjoining the extradition is the doctrine of federal abstention as provided in Younger v. Harris, 401 U.S. 37 (1971). In Younger, the Court held that absent extraordinary circumstances, a federal court is





precluded from enjoining a pending state criminal prosecution. 401 U.S. at 41.

One implied exception to the Younger doctrine of federal abstention is bad faith criminal prosecution. 401 U.S. at 47-49. The court in Younger distinguished the earlier case of Dombrowski v. Pfister, 380 U.S. 479, 14 L.Ed. 2d 22 (1965) in which the court permitted an injunction against criminal prosecution. One factor cited by the court in Dombrowski in finding abstention inappropriate was bad faith criminal prosecution. Id. at 490. The Supreme Court in Younger states as follows:

"These circumstances (bad faith criminal prosecution in Dombrowski), as viewed by the Court, sufficiently establish the kind of irreparable injury, above and beyond that associated with the defense of a single prosecution brought in good faith, that had always been considered sufficient to justify federal intervention."



401 U.S. at 48, 27 L.Ed. 2d at 678. Bad faith criminal prosecution, as present in the case at bar, warrants, if not demands, federal intervention to protect fundamental constitutional rights.

The Fifth Circuit in the opinion below relied upon the Eleventh Circuit case of Barnette v. Evans, 673 F.2d 1250 (11th Cir. 1982) in denying relief. The Eleventh Circuit in Barnett stated that prosecution brought as a "subterfuge for collection of a debt" did not create irreparable injury as required by Younger because the accused could defeat the prosecution in a single criminal proceeding. 673 F.2d at 1252. As discussed above, bad faith criminal prosecution establishes irreparable injury permitting federal intervention. See Wilson v. Thompson, 593 F.2 1375, 1382 (5th Cir. 1979); Shaw v. Garrison, 467 F.2 113, 120 (5th Cir. 1972) (cert den'd 409 U.S. 1024, 34 L.Ed. 2d 317).



The Fifth Circuit in the opinion below states that McDonald has no federally protected rights in bankruptcy. It is true that the state court may require restitution as a condition of probation without interfering with federally protected rights. The issue is not what the state court may permissibly do, but for what reasons may a prosecutor institute and prosecute criminal proceedings. As discussed above, it is clear that McDonald has a federally protected right of effective access to judicial process through civil and bankruptcy courts. Action taken by a criminal prosecutor to interfere with access to judicial process is interference with a federally protected right.

Summary: Petitioners are entitled to effective access to judicial process. The State of Minnesota, by seeking extradition for private purposes, is interfering with Petitioners' rights of access to the courts. To adequately protect Petitioners' constitutional rights,



Petitioners should be permitted to assert their constitutional rights in the asylum state for the purpose of defeating extradition.

2. THE DECISION BELOW DENIES PETITIONERS THE RIGHT TO ASSERT THEIR RIGHT TO DUE PROCESS AT A MEANINGFUL TIME.

It is Petitioners' contention that the Due Process Clause of the Fourteenth Amendment accords Petitioners with the right to a speedy habeas corpus hearing in the asylum state. The Sixth Amendment to the United States Constitution provides that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial". Even though extradition may not be a stage in a criminal prosecution at which speedy trial pursuant to the Sixth Amendment may be asserted, due process is applicable in all proceedings involving the loss of liberty or





property and provides the right to a speedy hearing.

The right to a speedy hearing is an essential element of due process. In a recent United States Supreme Court decision, the Court provided:

"the fundamental requirement of due process is the opportunity to be heard and it is an 'opportunity' which must be granted at a meaningful time and in a meaningful manner."

Parrat v. Taylor, 451 U.S. 527, 540 (1981) citing Armstrong v. Manzo, 380 U.S. 545, 552 (1965). In an earlier United States Supreme Court decision, the Court provided:

" . . . . promptness of decisions which in all judicial actions is one of the elements of justice."

Forsyth v. Hammond, 166 U.S. 506, 513 (1897). To provide Petitioners with due process in the extradition context, the asylum state court must



provide Petitioners with a speedy hearing to determine the legality of the proposed extradition.

Availability of due process protection depends upon the extent to which an individual will be condemned to suffer a grievous loss. Morrissey v. Brewer, 408 U.S. 471 (1972). Extradition results in a grievous loss to the accused. At the minimum, extradition results in imprisonment and transfer to a foreign state. Arrest of the accused in the asylum state results in embarrassment and ridicule for the accused. One facing extradition should be accorded a high level of due process protection in accordance with the serious loss of individual liberty resulting from extradition.

The Eighth Circuit has held that the speedy hearing requirement of the due process clause is applicable to proceedings under the Interstate Detainer Act. Cooper v. Lockhart, 489 F.2d 308 (8th Cir. 1973). The Eighth Circuit provided:



"The concept of a speedy trial as embodied within the Sixth Amendment to the United States Constitution was recognized to be so basic to a fair trial that it was set forth in a separate amendment. However, speedy trial applicability only to actual criminal prosecution does not mean that the due process clause rejects a prompt and timely hearing in other procedures, formal or informal."

Id. at 312. The Eighth Circuit's reasoning in Cooper is that one is entitled to a speedy hearing pursuant to the due process clause even though the proceedings may not be classified as a criminal prosecution for Sixth Amendment purposes. The Cooper court held that the grievous loss suffered by a prisoner facing transfer under the Interstate Detainer Act requires that the prisoner be afforded a prompt hearing pursuant to the due process clause. Id. at 314. One facing extradition is subject to loss of liberty much



the same as in an interstate extradition proceeding; therefore, one facing extradition should be accorded the same procedural protections, including a speedy hearing, as one facing transfer pursuant to the Interstate Detainer Act.

The Fifth Circuit in the opinion below held that inquiry into due process is not appropriate in a habeas corpus hearing challenging extradition. The Fifth Circuit stated that the Supreme Court in Michigan v. Doran limited the subjects of inquiry and due process was not a subject of inquiry in Michigan v. Doran.

As has been thoroughly discussed in the petition (pp. 35-36) Michigan v. Doran is not the sole authority on the rights of the accused in the asylum state. Another distinction between the case at bar and Michigan v. Doran is the substantive versus procedural distinction. Michigan v. Doran concerned inquiries into substantive matters. Michigan v. Doran did not purport to limit procedural due process





protections. For example, one permissible inquiry pursuant to Michigan v. Doran is whether the petitioner is a fugitive. 439 U.S. at 289, 58 L.Ed. 2d at 527. It would be a denial of procedural due process to require the state court to find that petitioner be a fugitive before extradition and, then, to deny the petitioner the opportunity to prove he is not the fugitive. It cannot be said that due process rights are not presentable in any hearing involving the loss of liberty.

If Petitioners are to be allowed to assert their due process rights at a meaningful time, Petitioners must be permitted to assert their due process rights in the asylum state. When the due process violation occurs in the asylum state, Petitioners must be permitted to assert their due process rights in the asylum state. If Petitioners are not permitted to assert their due process rights in the asylum state, the loss of liberty will have occurred before the Petitioners will



have the opportunity to prevent the wrong. To assert their due process rights at a meaningful time, Petitioners must be permitted to assert their due process rights in the asylum state.

The Fifth Circuit in the opinion below states that Petitioners should not be permitted to assert their due process rights in the asylum state because it would penalize the demanding state for the asylum state's wrong. The obvious error with this statement is that it assumes the delays were caused by the asylum state, not the demanding state. The delay may be caused by the failure of the demanding state to forward the extradition papers to the demanding state after the arrest of the alleged fugitive.

The demanding state is the agent of the asylum state in the extradition context.

Braden v. 30th Judicial Court of Kentucky, 410 U.S. 484, 498-499, 35 L.Ed. 2d 443, 454 (1973). As in traditional principal-agent relationships, the principal should be responsible for the



wrongs of the agent. The asylum state is acting for and to the benefit of the demanding state.

The wrongs of the asylum state should be considered the wrongs of the asylum state. The constitutional rights of the accused must be protected, regardless of the source of the wrong.

Summary: The right to a speedy hearing is an element of due process. Whenever a proceeding may result in the loss of liberty, due process must be provided to the participants in the hearing. Whenever the denial of due process occurs in the asylum state, the alleged fugitive must be permitted to assert his due process rights in the asylum state for the his process rights to be meaningful.

### CONCLUSION

A writ of certiorari should issue to review the opinion and judgment of the Fifth Circuit to ascertain the constitutional rights of the accused in the asylum state.



Respectfully submitted,

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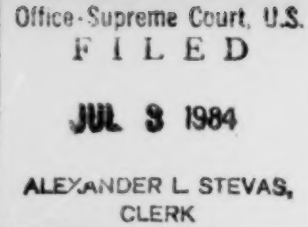
By 

Perry Westbrook

State Bar No. 21192000

84-19

2



IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO. \_\_\_\_\_

ORISON F. McDONALD, II  
AND  
HERBERT DARRELL BOMAR,  
Petitioners,

VS.

BILL BURROWS, SHERIFF OF WICHITA  
COUNTY, TEXAS; THE STATE OF TEXAS; AND  
THE STATE OF MINNESOTA  
Respondents.

APPENDIX TO PETITION FOR A  
WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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DATE: JULY 3, 1984

75PP





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OPINION OF THE COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

ORISON F. McDONALD, II AND HERBERT  
DARRELL BOMAR, Plaintiffs-Appellants

V.

BILL BURROWS, Sheriff of Wichita  
County, Texas, the State of Texas,  
and the State of Minnesota,  
Defendants-Appellees.

Nos. 83-1619, 83-1636 and 83-1731

May 7, 1984

Two persons who reside in Texas were criminally charged by the State of Minnesota for violation of Minnesota securities laws and ordered extradited by the Governor of Texas. They seek habeas corpus on the ground that their federal constitutional rights would be violated by their extradition because the Minnesota criminal proceeding was instituted to collect a private debt and as a result of private spleen against them, and because they were denied alleged constitutional rights to a speedy disposition of the extradition proceedings. One of



them also asserts that the Bankruptcy Code would be violated by his extradition because he has instituted bankruptcy proceedings in Texas and his presence in Texas is required. Finding no merit in the claims but instead an effort to delay, rather than to obtain, a speedy trial, we affirm the district court orders denying petitioners relief.

I.

Orison F. McDonald and Herbert Darrell Bomar were charged by Minnesota with the sale of unregistered securities (four counts) and fraud in the sale of securities (five counts). Pursuant to a fugitive warrant issued on the basis of a complaint and information filed by a Minnesota prosecutor, both were arrested in Wichita County, Texas, on March 31, 1981. They were discharged on August 31 because no extradition warrant had been issued. The Governor of Texas issued a warrant on October 16, and the two were again



arrested on October 23. They sought habeas corpus from state court on the same day.

The state district court granted the extradition request and its judgment was affirmed on appeal by the Texas Court of Appeals for the Second Supreme Judicial District on March 24, 1982. The Texas Court of Criminal Appeals refused a petition for discretionary review, and then denied a motion for rehearing on September 15, 1982. The United States Supreme Court denied the ensuing application for writ of certiorari. Both McDonald and Bomar then sought habeas corpus relief in federal court. The district court adopted the findings and conclusions of the magistrate to whom the petitions were referred and denied habeas corpus relief. McDonald also filed complaints seeking habeas relief under 28 U.S.C. Sec. 2256 and an injunction against extradition and criminal prosecution pursuant to 28 U.S.C., Sec. 1651.





## II.

[1,2] The extradition clause of the United States Constitution, article IV, Sec. 2, cl. 2, is intended to allow each state to bring offenders to trial as quickly as possible in the state where the offense was committed. The Constitution does not contemplate that the asylum state will make a determination of guilt or innocence or conduct "the kind of preliminary inquiry traditionally intervening between the initial arrest and trial." Michigan v. Doran, 439 U.S. 282, 288, 99 S.Ct. 530, 535, 58 L.Ed.2d 521 (1979). After the governor of the asylum state has granted extradition, a court in reviewing a petition for habeas relief may decide only "(a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive." Id. 439 U.S. at 289,



99 S.Ct. at 535, 58 L.Ed.2d at 527. Federal courts are not lightly to interfere in the constitutionally-mandated extradition process. It is not our province to inquire into the motives of the governors of the demanding and asylum states. Protection of the right of the demanding state swiftly to try alleged offenders who have left its jurisdiction requires that the courts of the asylum state review the extradition documents summarily. Courts of the asylum state are limited to determining the factors listed in Doran, characterized by the Supreme Court as "historic facts readily verifiable." 439 U.S. at 289, 99 S.Ct. at 535, 58 L.Ed.2d. at 527. They may not conduct a probable cause hearing. Id. at 290, 99 S.Ct. at 536, 58 L.Ed.2d at 528. They may not inquire into the constitutionality of prison conditions in the demanding state. On like principle, they may not probe the motives of the prosecutor.



After McDonald and Bomar were arrested, six month elapsed before the Governor of Texas issued an extradition warrant. Two more months passed after the warrant was issued before the habeas corpus hearing was held. McDonald and Bomar assert that these delays denied them speedy trials in violation of the sixth amendment and due process in violation of the fourteenth.

[3,4] Extradition is not, however, a criminal proceeding. It does not involve determination of the guilt or innocence of the person to be extradited and, therefore, does not invoke the same degree of protection of the defendant's constitutional rights. The First and Second Circuits have been declined to apply the sixth amendment right to a "speedy and public trial" to extradition proceedings. Sabatier v. Dabrowski, 586 F.2d 869 (1st Cir. 1978); Jhirad v. Ferrandina, 536 F.2d 478, 485, n. 9 (2d Cir.), cert. denied, 429 U.S. 833, 97 S.Ct. 97, 50 L.Ed.2d 98 (1976). We concur in their reasoning and join in their



result. The applicability of the sixth amendment to extradition is not a factual issue, so neither the state court nor the district court erred in deciding that question without an evidentiary hearing. Cf. 28 U.S.C., Sec. 2254(d) (1976) (no federal habeas corpus hearing necessary if state court hearing was adequate).

[5] McDonald and Bomar contend that, even if the sixth amendment does not apply to extradition proceedings, the due process clause of the fourteenth amendment provides an independent guarantee of a prompt hearing after an arrest on an extradition warrant. Even assuming that they could establish some prejudice due to the eight-month delay between their arrest and their extradition hearing, that inquiry is not appropriate in a habeas corpus hearing challenging their extradition. As we have noted, the Supreme Court has clearly limited the subjects into which a habeas court may inquire when reviewing a challenge to extradition. Moreover, if a writ of





habeas corpus were to issue on the basis of delays caused by Texas, the state of Minnesota would effectively be penalized for wrongs committed by Texas.

### III.

McDonald filed Chapter 11 bankruptcy proceedings in the Bankruptcy Court for the Northern District of Texas as a result of claims asserted against him in many civil suits filed by the investors in his securities transactions. He remains a debtor in possession under Chapter 11. McDonald filed separate complaints in his bankruptcy proceeding, one seeking a writ of habeas corpus pursuant to 28 U.S.C., Sec. 2256, and the other seeking to enjoin his extradition and criminal prosecution pursuant to the All Writs Act, 28 U.S.C., 1651, et seq.

[6] The district court, to which these complaints were transferred, denied certificates of probable cause. The statute requiring a certificate of probable cause for appeal, 28

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U.S.C., Sec. 2253, applies to habeas corpus proceedings only, and only when the detention complained of "Arises out of process issued by a State court." Because McDonald was brought before the court on an extradition warrant issued by the Governor of Texas and not on process issued by a state court, no certificate of probable cause to appeal the denial of habeas relief is required. Neither is 28 U.S.C., Sec. 2253 applicable to McDonald's appeal of the district court's refusal to enjoin a criminal proceeding, since that refusal is not "a final order in a habeas corpus proceeding." 28 U.S.C., Sec. 2253 (1976). The absence of certificates of probable cause in these appeals is therefore no barrier to review on the merits.

[7] A bankruptcy court is authorized by 28 U.S.C., Sec. 2256 to issue a writ of habeas corpus to prevent interference with the administration of the bankruptcy estate if the debtor "was arrested or imprisoned on process in any



civil action . . . issued for the collection of a debt." McDonald contends that he is entitled to habeas relief under this statute. The contention is not even superficially plausible: his extradition is for the purpose of facing a criminal proceeding, not of collecting a debt. The motive of those who prod the prosecutor is immaterial.

[8] Nor is McDonald entitled to an injunction against his extradition and criminal prosecution pursuant to the All Writs Act. An almost identical claim was squarely rejected by the Eleventh Circuit in Barnett v. Evans, 673 F.2d 1250 (11th Cir. 1982). As the Eleventh Circuit observed, "The purpose of bankruptcy is to protect those in financial, not moral difficulty." *Id.* at 1251. Moreover, federal courts may not enjoin state criminal proceedings unless there is great and immediate danger of irreparable harm to the plaintiff's federally protected rights, which cannot be eliminated by his defense against a single prosecution. As in Barnette,



the danger of irreparable harm to McDonald is merely speculative: "if there were a criminal conviction, the mandatory restitution sentence would conflict with the discharge order if the debt created by the theft were discharged . . . . [I]f we had some ham, we could have ham and eggs, if we had some eggs." 673 F.2d at 1252 (emphasis in original).

[9,10] McDonald seeks to distinguish Barnette on the ground that the Minnesota prosecution is allegedly brought in bad faith. This court has recognized that a federal court may enjoin a state prosecution "undertaken in retaliation for or to deter the exercise of constitutionally protected rights." Wilson v. Thompson, 593 F.2d 1375 (5th Cir. 1979). But, even if we were to accept McDonald's contention that the Minnesota authorities are acting in bad faith, he has failed to demonstrate that any constitutionally protected right is implicated. McDonald asserts that he has "a federal right to have his





debts administered through the bankruptcy court." We have held, however, that a federal court may, as a condition of probation, require an offender to make restitution to his victim for losses caused by his offense, even though the debt occasioned by the offense has been discharged in bankruptcy. United States v. Carson, 669 F.2d 216 (5th Cir. 1982). It follows that McDonald has no federal right to prevent the Minnesota courts from requiring him to repay debts that are the subject of his bankruptcy proceeding. See Barnette, 673 F.2d at 1252.

For these reasons, the judgment is  
AFFIRMED.



IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
WICHITA FALLS DIVISION

ORISON F. MCDONALD, II )  
 )  
VS. )  
 )  
SHERIFF JOHN F. GIBSON, Sheriff of )  
Wichita County, Texas; THE STATE OF )  
TEXAS; THE STATE OF MINNESOTA )

Civil Action No. CA-7-83-49

FINDINGS, CONCLUSIONS AND  
RECOMMENDATION OF THE  
UNITED STATES MAGISTRATE

Pursuant to the provisions of Title 28,  
United States Code, Section 636(b), and Miscella-  
neous Order No. 6 of the court in implementation  
thereof filed in the Dallas Division on March 8,  
1982, the subject cause has previously been  
referred to the United States Magistrate. The  
findings, conclusions and recommendations of the  
United States Magistrate, as evidenced by his  
signature thereto, are as follows:



## FINDINGS AND CONCLUSIONS:

### Type Case

This is a combined petition for writ of prohibition and a restraining order by a defendant released on state bond pursuant to Section 1651 of Title 28, United States Code, and presumably Rule 65 of the Federal Rules of Civil Procedure, respectively.

### Parties

Petitioner, Orison F. McDonald, II, is a Wichita Falls, Texas resident who faces charges in Minnesota for violation of state securities laws in connection with the sale of interests in his Texas-based oil and gas business to Minnesota investors. He is also a debtor in possession under Chapter 11 of the United States Bankruptcy Code in Bk. No. 7-81-00060, United States Bankruptcy Court for the Northern District of Texas, Wichita Falls Division, and is the defendant in a least once civil suit filed by Minnesota



investors.

Respondents names are Wichita County Sheriff John F. Gibson, the State of Texas and the State of Minnesota.

#### History of the State Case

Petitioner, Orison F. McDonald, II, and Herbert Darrell Bomar, who is not a party to this action, were arrested on March 31, 1981, in Wichita Falls on fugitive warrants based on complaints filed in Ramsey County, Minnesota, charging them with sale of unregistered securities and fraud in the sale of securities. Each man was released after posting a \$10,000.00 bond and each immediately filed an application for writ of habeas corpus in Wichita County 78th District Court.

On August 31, 1981, the district court ordered them discharged from the fugitive warrants because no Governor's warrants had been issued in Texas as provided by Section 7, Article





51.13 of the Texas Code of Criminal Procedure.

Governor's warrants were issued on October 16, 1981, and Bomar and McDonald were arrested on October 23, 1981. Both posted bond and filed habeas corpus applications in the 78th District Court. The court consolidated the writ applications and set a hearing for November 25, 1981, which was subsequently continued to December 11, 1981, on the state's motion. The trial court entered judgment on January 11, 1982, denying habeas relief sought and ordering the extradition of McDonald and Bomar.

The Texas Court of Appeals for the Second Supreme Judicial District affirmed the judgment of the trial court on March 24, 1982, and overruled a motion for rehearing on April 21, 1982; a copy of said opinion is attached as Appendix A. The Texas Court of Criminal Appeals refused the petition for discretionary review on June 16, 1982. Certiorari was denied by the United States



Supreme Court on February 22, 1983.

Related Federal Habeas Corpus Petitions

This case represents the third attempt by Petitioner to avoid extradition to Minnesota. He filed a petition for writ of habeas corpus in this court as CA-7-83-16, Orison F. McDonald, II v. John F. Gibson, Sheriff of Wichita County, Texas and the State of Texas in which he raised the claim that the Minnesota charges were filed as a result of undue influence by the Minnesota investors, in an attempt to strengthen their position in their civil suits against him. Relief was denied on August 2, 1983.

In CA-7-83-48, filed as an adversary proceeding in bankruptcy court and subsequently transferred to the district court, Petitioner sought relief pursuant to 28 U.S.C. 2256 on similar grounds of private claim motivation. The case is now under review by the court.



### Claims Presented

The court understands Petitioner to raise claims seeking orders:

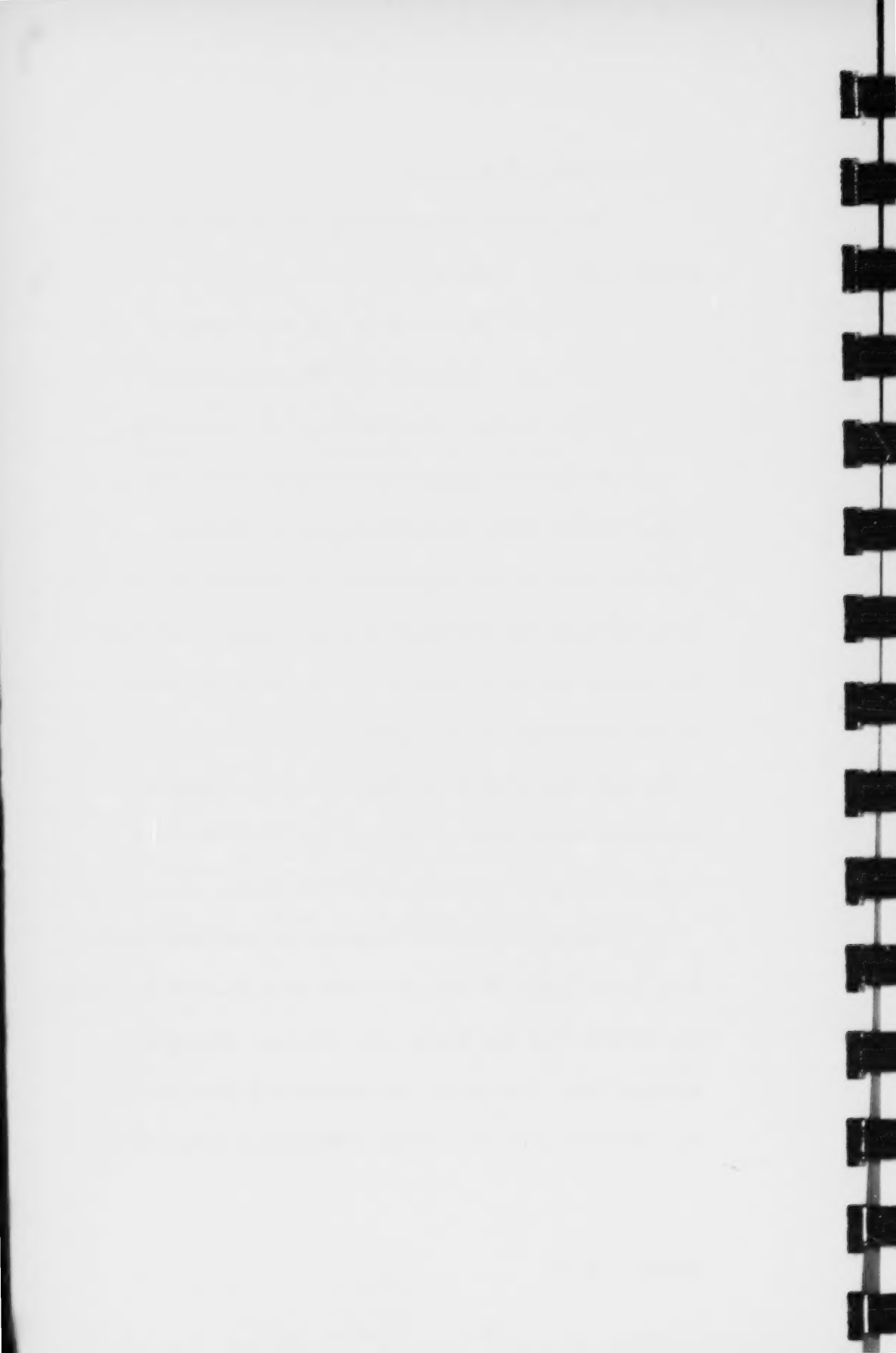
1. Prohibiting his extradition, and
2. Restraining his prosecution

First Claim: Prohibiting his extradition

Petitioner again seeks relief from the order of the 78th District Court of Wichita County that he be extradited to Minnesota, on the ground that the criminal charges were filed for the collection of a debt in an attempt to impair the jurisdiction of the bankruptcy court.

Although the statutory basis for the claim is different from that raised in CA-7-83-48, the factual basis is substantially the same.

Here, Petitioner asserts jurisdiction under 11 U.S.C. 105, 28 U.S.C. 1418 and 28 U.S.C. 1651. He claims that by filing the criminal charges against him, Minnesota is attempting to provide its citizens with an undue preference over other



creditors, thereby circumventing the authority of the bankruptcy court in authorizing a plan of reorganization or discharge of the debts.

Inherent in this claim is the assumption that the Minnesota investors somehow induced the Ramsey County prosecutor to bring the charges in order to strengthen their own bargaining position.

Petitioner states that judgment in excess of there million dollars was rendered against him in Minnesota District Court; he states the judgment is on appeal in No. 83-104-MN, Austin Hayden, et al vs. Orison F. McDonald, II, et al before the United States Court of Appeals for the Eighth Circuit.

Petitioner refers to several cases for the proposition that a bankruptcy court may temporarily or permanently enjoin a state criminal proceeding when it is necessary for the protection of the court's jurisdiction. However, Barnette v. Evans, 673 F.2d 1250, 1252 (11th Cir.





1982), presented in Respondent's brief squarely rejects Petitioner's claims on the basis of logical and persuasive reasoning.

In Barnette, a bankruptcy judge enjoined a county prosecutor and a complaining witness from continuing a state criminal prosecution on an indictment for theft by deception, arising from the issuance of worthless checks. The criminal defendant was a debtor in bankruptcy court, the complaining witness a creditor. The bankruptcy judge thought that a conviction, which would mandate restitution to the creditor would frustrate his jurisdiction to discharge the debt in bankruptcy, should he decide that the debt was dischargeable.

The Eleventh Circuit, in dissolving the injunction, held as follows as 1252:

Contrary to plaintiff's argument, 11 U.S.C.A. 105(a) gives a bankruptcy court no more authority to ignore the principles of Younger v. Harris, [401 U.S. 37 (1971)] than does the grant of general jurisdiction to a district court.



The Younger Court held that a federal court should not enjoin a pending state criminal prosecution except under extraordinary circumstances where there is a great and immediate danger of irreparable harm to plaintiff's federally protected rights that cannot be eliminated by his defense against a single prosecution. (citation omitted).

....

Some district courts have interfered with state criminal proceedings only where subversion of the criminal process to collect debt was found. (citation omitted). If Barnette believed the prosecution for theft was a subterfuge for collection of a debt, he could have raised the issue as a defense in the state criminal proceeding.

In this case Petitioner seeks an injunction

permanently prohibiting the State of Minnesota

from prosecuting him. As the court stated in

Barnette at 1251:

The purpose of bankruptcy is to protect those in financial, not moral, difficulty. The



bankruptcy courts were not created as a haven for criminals. (citations omitted). There is a public interest in every good faith criminal proceeding, especially on the presentment of a grand jury, which overrides any interest the bankruptcy court may have in protecting the financial interest of debtors.

Although the Minnesota charges were filed by complaint, rather than indictment, the rationale is applicable. The recommendation that the injunction be denied does not reflect an opinion as to the merits of Petitioner's claim that Minnesota investors unduly influenced the filing of the charges. However, the principles of federalism require that this defense be raised in Minnesota state court.

Second Claim: Restraining his prosecution

The first question needing answer under this claim is whether this court has jurisdiction over the Minnesota state authorities in this matter; no affirmative authority has been offered



by Petitioner and this question is at best debatable. Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484, 487, 499-500 (1972). See Wingo v. Ciccone, 507 F.2d 354 (8th Cir. 1974). Even if jurisdiction exists, Petitioner has shown no clear and indisputable right to the extraordinary writ. United States v. United States District Court, Southern District of Texas, 506 F.2d 383, 384 (5th Cir. 1974).

In this application for a writ of prohibition to restrain the Minnesota state authorities from proceeding with a criminal trial of Petitioner, the question involved is whether that court has jurisdiction to determine the matter before it and of the accused. 73 C.J.S. Prohibition 11.

In United States v. Boe, 543 F.2d 151, 158 (Patents 1976), the Court discusses the writ of prohibition as follows:

...Though the power is curative,  
it is strong medicine and its use  
must therefore be restricted to





the most serious and critical ills. Use of the power is thus not unfettered. On the contrary, its reparative function is to be sparingly employed. (footnote omitted).

A basic tenet of our jurisprudence is that appellate review, in all but narrowly defined, exceptional circumstances, should be postponed until final judgment has been rendered by the trial court. Will v. United States, 389 U.S. 90, 88 S.Ct. 269, 19 L.Ed.2d or mandamus has the burden of showing a clear and indisputable right thereto, Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 74 S.Ct. 145, 98 L.Ed. 196 (1953), and must show exceptional circumstances necessitating review before final judgment below. See De Beers Consolidate Mines Ltd. v. United States 325 U.S. 212, 53 S.Ct. 1130, 89 L.Ed. 1566 (1945).

Petitioner would be entitled to relief in this court if the court found a lack of diligence and good faith by the demanding state authorities in securing Petitioner's right to a speedy trial. McEachern v. Henderson, 485 F.2d 694 (5th Cir. 1973). However, the pleadings affirmatively show



that the Minnesota authorities have been sufficiently diligent in seeking the return of Petitioner. Since no lack of diligence on the part of the state court is shown, a writ of prohibition will not lie. Petitioner has failed to meet the burden of a "clear and indisputable right." RECOMMENDATION:

It is recommended that the extraordinary writ of prohibition sought here be denied since the Minnesota state courts have jurisdiction of the matter, which affords an adequate remedy and precludes any possibility of Petitioner making a showing of a clear and indisputable right to such extraordinary writ.

SIGNED this 16th day of August, 1983.

Signed by Alex H. McGlinchey, United States Magistrate.



IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
WICHITA FALLS DIVISION

ORISON F. MCDONALD, II )  
 )  
V. )  
 )  
SHERIFF JOHN F. GIBSON, Sheriff of )  
Wichita County, Texas; THE STATE OF )  
TEXAS; THE STATE OF MINNESOTA )

Civil Action No. CA-7-83-49

ORDER

The court has made an independent review of  
this case of:

1. the pleadings, files and record;
2. the proposed findings, conclusions and  
recommendation of the magistrate filed August 16,  
1983; and,
3. Petitioner's Reply to Findings, Conclu-  
sions and Recommendations of the United States  
Magistrate filed September 9, 1983, and consist-  
ing of nine-typewritten pages submitted by  
counsel.

The court, after a de novo review of the



portion of the findings and recommendation of the magistrate to which an objection has been made by Petitioner, finds and determines that Petitioner's objections to the proposed findings and recommendation are without merit.

Petitioner submitted on August 11, 1983, his Motion for Protective Orders which has been considered on the merits, and hereby is DENIED.

IT IS ORDERED that the findings and recommendation of the magistrate are accepted after first taking into consideration Petitioner's objections.

IT IS FURTHER ORDERED that the Clerk of the Court shall transmit a true copy of this Order to Petitioner and to Respondent and his counsel.

SIGNED this 29th day of September, 1983.

Signed by Mary Lou Robinson, United States District Judge.





IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
WICHITA FALLS DIVISION

ORISON F. MCDONALD, II

V.

SHERIFF JOHN F. GIBSON, Sheriff of  
Wichita County, Texas; THE STATE OF  
TEXAS; THE STATE OF MINNESOTA

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Civil Action No. CA-7-83-49

JUDGMENT

This action came on for consideration before the court, Honorable Mary Lou Robinson, District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered as set forth in the Order entered this date.

IT IS ORDERED and ADJUDGED that this petition for writ of habeas corpus be denied for the reasons set forth in the magistrate's findings, conclusions and recommendation and adopted as the findings and conclusions of the court as set forth in said Order.



IT IS FURTHER ORDERED that the Clerk of the Court shall transmit a true copy of this Final Judgment to Petitioner and Respondent.

SIGNED this 29th day of September, 1983.

Signed by Mary Lou Robinson, United States District Judge.



IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
WICHITA FALLS DIVISION

ORISON F. McDONALD, II

V.

JOHN F. GIBSON, SHERIFF OF  
WICHITA COUNTY, TEXAS and  
THE STATE OF TEXAS

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CIVIL ACTION NO. CA-7-83-16  
[Consolidated with CA-7-83-17]

FINDINGS, CONCLUSIONS AND RECOMMENDATIONS  
OF THE UNITED STATES MAGISTRATE

Pursuant to the provisions of Title 28,  
United States Code, Section 636(b), and Miscella-  
neous Order No. 6 of the court in implementation  
thereof filed in the Dallas Division on March 8,  
1982, the subject cause has previously been  
referred to the United States Magistrate. The  
findings, conclusions and recommendations of the  
United States Magistrate, as evidenced by his  
signature thereto, are as follows:



## FINDINGS AND CONCLUSIONS:

### Type Case

This is a petition for writ of habeas corpus by pretrial detainees pursuant to 28 U.S.C., Sec. 2241. Atkins v. People of the State of Michigan, 644 F.2d 543 n. 1 (6th Cir. 1981).

### Parties

Petitioner Orison F. McDonald, II challenges his extradition from Texas to Minnesota to face charges that he violated Minnesota securities laws in the sale of interests in his Texas-based oil and gas business to Minnesota residents. Petitioner Herbert Darrell Bomar filed an identical petition under CA-7-83-17. McDonald and Bomar are represented by the same attorneys. Because the petitions raise the same issues and have been handled together throughout the state extradition hearings and appeals, the cases have been consolidated on Petitioners' motions. Both McDonald and Bomar are free on





bond and apparently reside in Wichita Falls, Texas. Respondents are Wichita County Sheriff John F. Gibson and the State of Texas.

#### History of the State Case

Petitioners on March 31, 1981, were arrested in Wichita Falls, Texas, on fugitive warrants based on complaints filed in Ramsey County, Minnesota, charging sale of unregistered securities and fraud in the sale of securities in violation of Minnesota law; each posted a \$10,000 bond and was released; and each filed an application for writ of habeas corpus in Wichita County 78th District Court.

On August 31, 1981, the trial court ordered them discharged from the fugitive warrants as a result of the failure of the Governor of Texas to issue a warrant, pursuant to Section 7, Article 51.13 of the Texas Code of Criminal Procedure.

On October 16, 1981, Governor's warrants were issued for the extradition of both Petitioners. They were arrested on October 23, 1981,



made bond and filed applications for writ of habeas corpus in the Wichita County 78th District Court. The court consolidated the writ applications and ordered a hearing on November 25, 1981, which was subsequently continued to December 11, 1981, on the State's motion. The trial court entered its judgment on January 11, 1982, denying the habeas relief sought by Petitioners and ordering their extradition to Minnesota.

The Texas Court of Appeals for the Second Supreme Judicial District affirmed the judgment of the trial court on March 24, 1982, and overruled a motion for rehearing on April 21, 1982. The Texas Court of Criminal Appeals refused the petition for discretionary review on June 16, 1982. The United States Supreme Court denied certiorari on February 22, 1983.

Respondents state that they believe Petitioners have exhausted state remedies as required by 28 U.S.C., Sec. 2254.



### Issues Presented

Petitioners, represented by counsel, each raise two issues:

1. Petitioner was unconstitutionally prevented from challenging the legality of his extradition on the basis that the extradition was instituted by the State of Minnesota and its employees to enable private citizens to enforce a claim, as an expression of private citizens' personal malice, and/or for purely private reasons.

2. (A) Petitioner was denied his sixth amendment right to a speedy disposition of his extradition.

(B) Petitioner was denied his fourteenth amendment due process right to a speedy disposition of his extradition

First Issue: Denial of review of motive behind Minnesota charges.

Petitioners assert that they were unconstitutionally prevented from Challenging the legality of their extradition on the ground that the criminal charges were filed in Minnesota in order to allow dissatisfied investors to express their personal malice or to obtain an advantage in



settling certain civil damage suits pending against the Petitioners.

The complaints filed in Minnesota charging each Petitioner with four counts of sale of unregistered securities and five counts of fraud in the offer or sale of securities was based on the affidavit of Gary LaVasseur, a securities investigator for the Minnesota Department of Commerce. LaVasseur attached a nineteen-page memorandum summarizing his investigation, as well as accounts of conversations with investors John W. Adler, Thomas Bastasz, Leslie Frishman and Harold Rutchick and with both Petitioners. The report states that 71 Minnesota residents invested over \$3,000,000 in enterprises managed by Bomar and McDonald between 1977 and 1981.

At the habeas corpus hearing conducted on December 11, 1981, Orison F. McDonald, II, his son Bruce McDonald and his employee Helen Mooney testified that Rutchick, Bastasz, Frishman and Adler each made threats during November and





December 1980 that criminal charges would be filed in Petitioners did not return the money which had been invested. (S.F. Hearing on Writ of Habeas Corpus, 160, 182-85, 192). Petitioners also introduced complaints filed by over forty investors in four separate suits filed in Minnesota District Court naming Orison McDonald, Orison "Mack" McDonald, II and McDonald Investments, Inc. as defendants. Rutchick, Frishman and Adler were plaintiffs in at least one of the civil suits, and Petitioners assert that Bastasz is a party to a Chapter 11 bankruptcy action filed by McDonald Investments, Inc., Orison McDonald and Orison F. "Mack" McDonald, II in the Northern District of Texas. The state did not call the investors as witnesses or otherwise attempt to rebut the testimony that the four men had threatened to bring criminal charges.

The trial court in its opinion of January 11, 1982, held as follows on this issue:



The Court further considered relators' motion to quash the extradition warrant by virtue of the fact that the same was issued on private claims and in conjunction therewith finds that although relators' private claim evidence was uncontroverted the demanding state has certified that no action is being had by virtue of a private claim, and that the Governor of this state duly considered the issue of private claims which was denied by the Governor and the Court therefore finds that such motion to quash is hereby denied.

It should be noted that no evidence was introduced to show that any of the four investors was in a position to make good his threat to bring criminal charges by exerting undue influence on the independent judgment of the Ramsey County prosecutor. However, it is not necessary to determine the validity of Petitioners' claim that the charges were filed solely to improve the bargaining power of the investors in their civil suits or as an expression of revenge or ill will for what they regarded as an unsatisfactory business deal. Whether the charges were motivated by private animosity is not a matter of review for a federal court in the asylum state.



The extradition clause of the United States Constitution, Article IV, Sec. 2, cl. 2, is intended to allow each state to bring offenders to trial as quickly as possible in the state where the offense was committed.

Biddinger v. Commissioner of Police, 245 U.S. 128 (1917). The Constitution does not contemplate that the asylum state will make a determination of guilt or innocence or conduct "the kind of preliminary inquiry traditionally intervening between the initial arrest and trial."

Michigan v. Doran, 439 U.S. 282, 288 (1979).

After the governor of the asylum state has granted extradition, a court in reviewing a petition for habeas relief can decide only "(a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive." Id. at 289. The



extradition process, because mandated by the Constitution, is not often to be interfered with by habeas corpus, and habeas corpus is not to be used to inquire into the motives of the governors of the demanding and asylum states.

United States ex rel. Tyler v. Henderson, 453 F.2d 790, 793 (5th Cir. 1979).

Petitioners argue that Michigan v. Doran, supra is not controlling because in that case the issue was whether the courts of the asylum state could review a finding of probable cause made by a judicial officer of the demanding state.

Petitioners argue that Doran does not hold that a court of the asylum state may not review the motive behind the filing of the criminal charges. However, the case should not be read so narrowly.

Michigan v. Doran, supra represents the principle that in order to protect the right of each state swiftly to try offenders who have left its jurisdiction, the courts of the asylum state may make only a summary review of the extradition





documents. Basically, the courts may determine only that the documents are in order, that a crime has been charged and that the petitioner is the person charged. If the courts of the asylum state may not make a judicial review of the demanding state's finding of probable cause to believe a crime has been committed, there is no persuasive reason for permitting them to look behind the face of the affidavit to review the prosecutor's motive for filing the charges.

It is recommended that relief be denied on this issue.

Second Issue: Denial of right to speedy disposition of extradition.

Petitioners assert that their right to a speedy determination of Minnesota's request for extradition has been denied in violation of the sixth and fourteenth amendments. They point out the passage of six months between their arrests and the issuance of the Governors' warrants and



the more than eight-month period between the arrests and their habeas corpus hearing.

The sixth amendment provides in part that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . .". The right to a speedy trial is applicable to the states through the due process clause of the fourteenth amendment.

Klopfer v. North Carolina, 386 U.S. 213 (1967).

Because an extradition is not a criminal proceeding with the same recriminations as a criminal trial, the sixth amendment by its terms is inapplicable. An extradition proceeding does not involve a determination of guilt or innocence and therefore does not invoke the same degree of protection of the defendant's constitutional rights. Simmons v. Braus, 627 F.2d 635 (5th Cir. 1980). See Bingham v. Bradley, 241 U.S. 511, 517 (1916).

Although no decision from this circuit has been discovered, the Second Circuit has declined



to apply the sixth amendment right to a "speedy and public trial" to extradition proceedings, on the basis of persuasive reasoning which is adopted here. Caltagirone v. Grant, 629 F.2d 739, 748 n. 19 (5th Cir. 1980); Sabatier v. Dabrowski, 586 F.2d 866, 869 (2nd Cir. 1978).

Petitioners assert entitlement to an evidentiary hearing on the factual issue of whether their constitutional right to a speedy trial was violated by the delay in ordering their extradition. They point to 28 U.S.C., Sec. 2254(d) and Townsend v. Sain, 372 U.S. 293 (1966) in support of the claim that because the state court held the right to a speedy trial to be inapplicable to an extradition proceeding, they are entitled to a hearing on this issue. However, whether extradition is a "criminal prosecution" within the meaning of the sixth amendment is legal, rather than a factual, issue. No evidentiary hearing is required by 28 U.S.C.,



Sec. 2254; nor is it necessary for a determination of the merits of this claim.

A petitioner should not be allowed to profit in a habeas proceeding from his own mischief. Here, the Petitioners have left no stone unturned to block or delay heir extradition; they should not be permitted now to claim lack of a speedy disposition when the delay is of their own making.

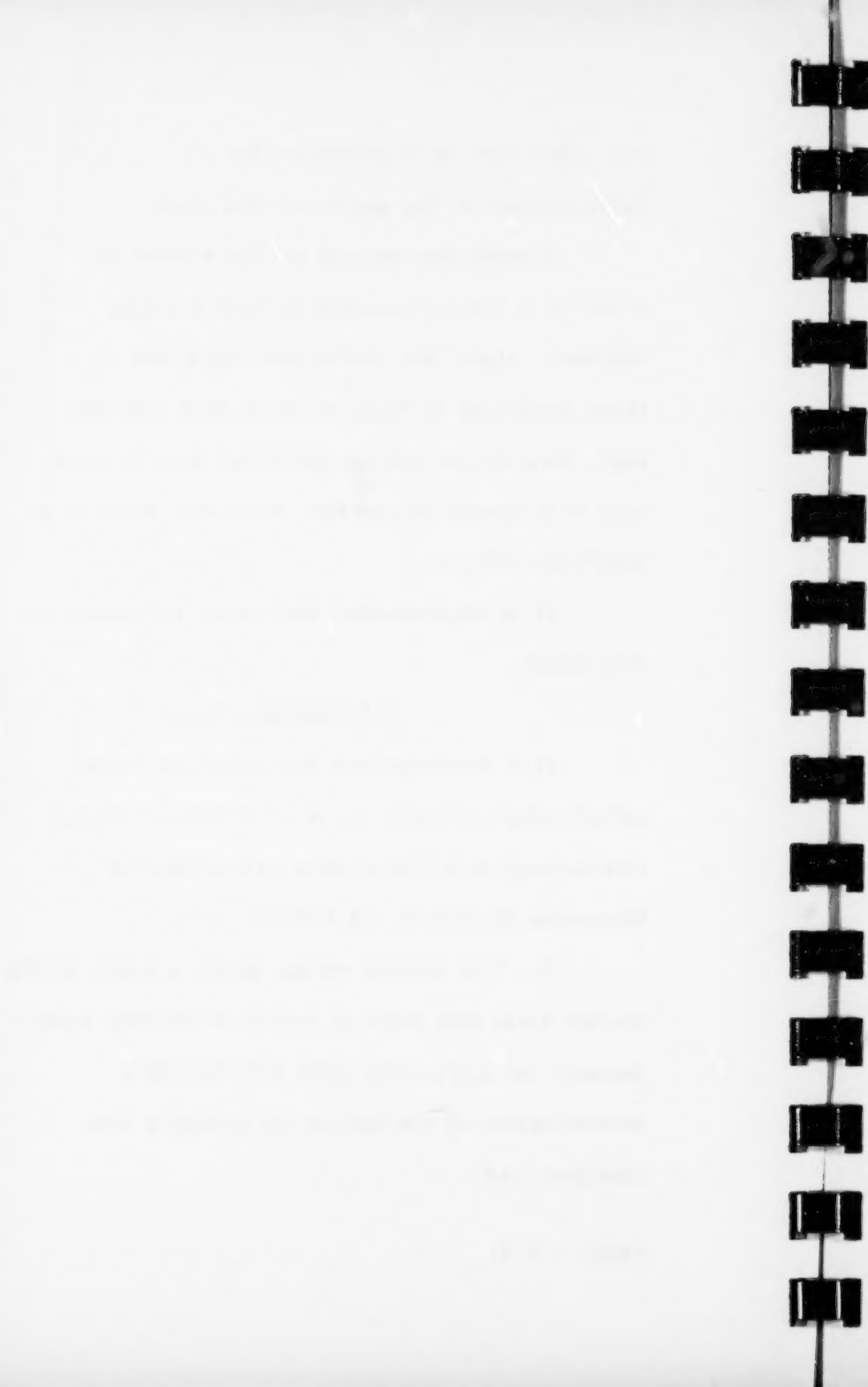
It is recommended that relief be denied on this issue.

#### RECOMMENDATION:

It is recommended that relief on these consolidated petitions for writ of habeas corpus challenging each Petitioner's extradition to Minnesota be denied, as follows:

1. The limited review which a court of the asylum state may conduct into a demanding state's request for extradition does not include a determination of the motive for bringing the charges; and





2. An extradition hearing is not a "criminal prosecution" entitled to sixth amendment protection.

SIGNED this 29th day of June, 1983.

Signed by Alex H. McGlinchey, United States Magistrate.



IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
WICHITA FALLS DIVISION

ORISON F. McDONALD, II

V.

JOHN F. GIBSON, SHERIFF OF  
WICHITA COUNTY, TEXAS and  
THE STATE OF TEXAS

CIVIL ACTION NO. CA-7-83-16  
[Consolidated with CA-7-83-17]

ORDER

The court has made an independent review in  
this case of:

1. the pleadings, files and record;
2. the proposed findings and recommenda-  
tion of the magistrate filed June 29, 1983; and
3. Petitioners' response to the magis-  
trate's findings, conclusions and recommendations  
filed July 22, 1983, which will be considered as  
their objections pursuant to Section 636, and  
specifically including a de novo determination of  
the portion of the proposed findings, conclusions  
and recommendations to which objection has been



made. Petitioners' said response primarily reurges information available to the magistrate. Petitioners' assertion of a Fourteenth Amendment due process right to a speedy disposition of their habeas corpus proceedings challenging extradition cites no case authority in support, nor has such authority been found. This allegation fails to rise to constitutional dimension.

IT IS ORDERED that the findings, conclusions and recommendation of the magistrate be adopted for the reasons set forth in said findings, after first taking into consideration Petitioners' objections.

IT IS FURTHER ORDERED that the Clerk of the Court shall transmit a true copy of this order to each party and their respective counsel.

SIGNED this 2nd day of August, 1983.

Signed by Mary Lou Robinson, United States District Judge.



IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
WICHITA FALLS DIVISION

ORISON F. McDONALD, II

V.

JOHN F. GIBSON, SHERIFF OF  
WICHITA COUNTY, TEXAS and  
THE STATE OF TEXAS

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CIVIL ACTION NO. CA-7-83-16  
[Consolidated with CA-7-83-17]

JUDGMENT

This action came on for consideration before the court, Honorable Mary Lou Robinson, District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered as set forth in the Order entered this date.

IT IS ORDERED and ADJUDGED that this petition for writ of habeas corpus be denied for the reasons set forth in the magistrate's findings, conclusions and recommendation and adopted as the findings and conclusions of the court as set forth in said Order.





IT IS FURTHER ORDERED that the Clerk of the Court shall transmit a true copy of this Final Judgment to Petitioners and Respondents.

SIGNED this 2nd day of August, 1983.

Signed by Mary Lou Robinson, United States District Judge.



OPINION OF THE COURT OF APPEALS  
FOR THE SECOND SUPREME JUDICIAL  
DISTRICT OF TEXAS

EX PARTE ORISON F. McDONALD, II,  
Relator  
AND

HERBERT DARRELL BOMAR,  
Relator

631 S.W.2d 221

On the 31st day of March, 1981, appellants were arrested on fugitive warrants based upon complaints filed in the State of Minnesota. An initial Writ of Habeas Corpus was filed on behalf of each appellant in No. 116,534-B. On the 16th day of October, 1981, Governor's warrants were handed down by the Governor of the State of Texas for extradition of the appellants to the State of Minnesota. On October 23, 1981, appellants were arrested and a Petition for Writ of Habeas Corpus was filed on behalf of appellant McDonald as No. 117,895-B and on behalf of appellant Bomar as No. 117,896-B in the 78th District Court of Wichita County, Texas. The Court consolidated such writs



as No. 117,896-B. A hearing thereon was held on the 11th day of December, 1981, and the trial court entered its judgment on the 11th day of January, 1982. In that judgment, the trial court denied the habeas corpus relief sought by the appellants and ordered them extradited to the State of Minnesota. From this extradition judgment, these appeals have been taken.

We affirm the judgment of the trial court.

By their grounds of error numbered 1, 2, 3, 4, and 13, appellants complaint that the trial court erred in denying habeas corpus relief and ordering extradition in light of evidence adduced which they contend shows that extradition was brought to aid the enforcement of a private claim, the collection of a debt, the gratification of personal malice and/or for purely private interests.

At the threshold, we note that the United State Supreme Court in Michigan v. Doran, 439 U.S. 282 (1978), at page 289, held that:



Once the governor has granted extradition, a court considering release on habeas corpus can do no more than decide (a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive.

We are constrained to hold that this holding circumscribes and limits our scope of review. The case of Ex Parte Hatfield, 235 S.W. 591 (Tex. Crim. App. 1921) stands for the proposition that inquiry into the motive for extradition proceeding cannot be considered. Nevertheless, later cases indicate that inquiry into the motive for extradition proceedings is permitted in a habeas corpus proceeding attacking extradition. Ex Parte Seffens, 376 S.W.2d 348 (Tex. Crim. App. 1964) and Ex Parte Bradley, 456 S.W.2d 370 (Tex. Crim. App. 1970). We are not





directed to any cases, and indeed we find none, decided subsequent to Michigan v. Doran, supra, that would permit inquiry into the motive for the extradition proceedings. Grounds of error 1, 2, 3, 4, and 13 are overruled.

By grounds of error numbered 5 and 12, appellants complain that the trial court erred in denying habeas corpus relief for the reason that they were denied a speedy trial on the extradition request. Again we are not directed to any cases holding that Texas Speedy Trial Act is applicable to extradition proceedings. We feel justified in holding that the Act is not applicable. Cf. Gill v. State, 593 S.W.2d 697 (Tex. Crim. App. 1980). Grounds of error 5 and 12 are overruled.

By ground of error number 6, appellants urge that the trial court erred in denying habeas corpus relief because "the Governor's warrant and the documents supporting the Governor's warrant were insufficient on their face to establish that



a judicial determination of probable cause was made in Minnesota." We disagree.

The documents relating to extradition are to be found in State's Exhibits, RES-1 (relating to Bomar) and RES-2 (relating to McDonald). Each contains a "complaint" signed by one Gary A. LaVasseur charging the appellants with one or more offenses of securities violations under the laws of Minnesota. Each complaint is seven pages in length, signed before a magistrate of the State of Minnesota. On page seven of each "complaint", the Minnesota magistrate makes a finding of probable cause. Ground of error number 6 is overruled.

By ground of error number 7, appellants urge that the trial court erred in refusing to grant habeas corpus relief because the "complaint" on which the extradition proceedings are brought are based on the complainant's information and belief. This is sufficient. Ex Parte



Harris, 389 S.W.2d 668 (Tex. Crim. App. 1965).

Ground of error number 7 is overruled.

By ground of error number 8, appellants urge that the trial court erred in denying habeas corpus relief and in ordering extradition because the State failed to identify the appellants as the persons sought for extradition by the demanding state.

The learned trial judge in his judgment entered on January 11, 1982, held:

The Court then considered the relator's motion to quash the Governor's warrant for reason of improper identity, and having considered the evidence finds the relators herein are duly and properly identified both by name of idem sonans and by pictures in the accompanying papers with such warrant and by relators' own testimony, and such motion is hereby denied.

We hold that the record, as a whole, which we have carefully reviewed, supports these



findings of the trial court relative to identity.  
Ground of error number eight is overruled.

In their ground of error number nine, appellants contend that the trial court erred in denying appellants' Special Plea in Bar because extradition of the appellants would constitute "double jeopardy". We disagree. There can be no jeopardy in a criminal action until the jury is empaneled and sworn. Crist v. Bretz, 437 U.S. 28 (1978). This has not occurred in either Texas or Minnesota. Ground of error number nine is overruled.

By ground of error number ten, appellants contend that the trial court erred in refusing to admit into evidence and in sustaining a State's objection to a tape recording (and/or transcript thereof) of appellant Bomar's conversation with one Lee Heutmaker in support of their "private claims" motions. Our discussion and holding on grounds of error numbers 1, 2, 3, 4, and 13





dispose of this ground of error, which is overruled.

In their ground of error number 11, appellants contend that the trial court erred in granting extradition and in denying habeas corpus relief in that appellants were restrained of their liberty from March 13, 1981, until August 31, 1981, on the "basis of a fugitive warrant and no "Governor's warrant . . ." Again we are referred to no case law relative to this issue. However, the record does not reflect that either appellant was "restrained of his liberty". Ground of error number eleven is overruled.

Finally, appellants urge the trial court erred in admitting the Governor's warrant and its supporting documents "because they were insufficient as a matter of form substance to contain the necessary requisites to sustain" the appellants' extradition.

V.A.C.C.P. Art. 51.13, Sec. 3, provides in pertinent part:



No demand for extradition of a person charged with crime in another state shall be recognized by the Governor unless in writing . . . and accompanied . . . by a copy of an affidavit before a magistrate there, together with a copy of any warrant which issued thereupon . . .

We have discussed generally, the documents relative to extradition under ground of error number six above. The main document which we referred to as "complaint", signed before a Minnesota magistrate, is an affidavit and it contains a warrant issued thereupon signed by such magistrate. Ground of error number fourteen is overruled.

The judgment of the trial court is affirmed.



OPINION OF THE 78TH DISTRICT COURT  
OF WICHITA COUNTY TEXAS

EX PARTE:  
ORISON F. McDONALD, II,  
ET AL

On this the 11th day of December, 1981,  
came on to be heard the Writ of Habeas Corpus  
heretofore filed herein by Petitioners Orison  
Fleming McDonald, II, aka Orison F. "Mack"  
McDonald, II and Herbert Darrell Bomar, aka  
Darrell H. Bomar, Relators.

The State of Texas was duly represented by  
and through District Attorney's Office of Wichita  
County, Texas, with such representation being  
furnished by District Attorney Timothy D. Eyssen  
and Petitioners were duly represented by the  
Honorable Perry Wesbrooks and the Honorable Greg  
Merkle.

The Court having previously considered  
motions to consolidate entered an order that  
Causes 116,534-B, 117,895-B, and 117,896-B be  
duly consolidated with the surviving case being



Cause No. 117,896-B to be entitled Ex Parte:  
Orison Fleming McDonald, II, et al.

The Court heard relators' motions for discovery, duly ruled on same.

The Court then considered relators' motion to quash the Governor's warrant for lack of probable cause, and finds that full faith and credit should be given to the demanding state's criminal action, and such motion is hereby denied.

The Court further considered relators' motion to quash the warrant for lack of information and belief, and finds that full faith and credit should be given duly issued information in accordance with the laws of the demanding state, and such motion is hereby denied.

The Court then considered the relators' motion to quash the Governor's warrant for reason of improper identity, and having considered the evidence finds the relators herein are duly and properly identified both by name or idem sonans





and by pictures in the accompanying papers with such warrant and by relators' own testimony, and such motion is hereby granted.

The Court then considered the motion of relators to quash the warrant by virtue of constitutional grounds, both within the Constitution of the United States of America and the State of Texas and finds that such constitutional grounds as alleged have not been violated but have been handled in compliance with requirements of such clauses, and such motion is hereby denied.

The Court then considered the relators' motion to dismiss the extradition by virtue of the reason that the relators were in a Chapter 11 bankruptcy, and the Court duly finds therein that a Chapter 11 bankruptcy is a civil proceeding and further finds that no instruction or order has been issued by the Bankruptcy Courts of the Northern District of Texas or by the Bankruptcy Courts of the State of Minnesota wherein certain



adversary civil litigation filed in such bankruptcy has been duly transferred by the U.S. Bankruptcy Court, Northern District of Texas.

The Court further finds that the extradition clause of the Constitution of the United States provides for and governs the action of not only the state executive but those of the courts of the asylum state, and that such motion is hereby denied for lack of jurisdiction over bankruptcy matters.

The Court jointly considered relators' special pleas in bar and motion to dismiss by virtue of failure to be tendered a speedy trial and finds that a speedy trial is a speedy trial upon the actual criminal cause therein and not as to extradition, and hereby denies such motion.

The Court further considered relators' motion to quash the extradition warrant by virtue of the fact that the same was issued on private claims and in conjunction therewith finds that although relators' private claim evidence was



uncontroverted, the demanding state has certified that no action is being had by virtue of a private claim, and that the Governor of this state duly considered the issue of private claims which was denied by the Governor, and the Court therefore finds that such motion to quash is hereby denied.

The Court, having denied the various motions to quash, finds that the Governor's warrants issued for relators herein are regular on their face, sufficient in form and contain the necessary requisites to sustain the extradition of the relators. In connection herewith, the Court finds that the Governor's warrants duly issued by the Govern of the State of Texas are supported by the introduced documents from the demanding state, the State of Minnesota, and the same has been properly attested to in form sufficient to meet the requirements of the Uniform Extradition Act as well as the demanding state, the State of Minnesota.



The Court further finds that the Petitioners, relators herein, have been duly charged with a crime as the same is provided for in the Statutes of the demanding state, the State of Minnesota.

The Court further finds that Petitioners, relators, are fugitives from the demanding state, the State of Minnesota.

Wherefore, premises considered, this Court finds that the Petitioners, relators herein, should be remanded to the State of Minnesota pursuant to that state's requisition, and that said Petitioners, relators, are hereby remanded to the Sheriff of Wichita County, Texas, to be incarcerated until the proper authorities from the demanding state, the State of Minnesota, can return said Petitioners, relators, to the State of Minnesota, and the Sheriff is hereby ordered following completion by relators of appeals, if any, to notify the State of Minnesota and said





Petitioners may be released to said Minnesota authorities.

The Court further sets bonds for appeal in this matter at \$7,500.00 for each of the relators herein pending any appeals by relators to the Texas or Federal Appellate Courts having jurisdiction.

Entered this 11th day of January, 1982.



IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1983

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NO. \_\_\_\_\_

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ORISON F. McDONALD, II  
AND  
HERBERT DARRELL BOMAR,  
Petitioners

VS.

BILL BURROWS, SHERIFF OF  
WICHITA COUNTY, TEXAS; THE STATE OF  
TEXAS; AND THE STATE OF MINNESOTA,  
Respondents

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APPLICATION FOR RECALL AND STAY OF  
MANDATE AND STAY OF EXTRADITION ORDER OF  
UNITED STATES COURT OF APPEALS FOR  
THE FIFTH CIRCUIT

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To The Honorable Byron R. White, Associate  
Justice of the Supreme Court of the United States  
and Circuit Justice for the Fifth Circuit:

Orison F. McDonald, II and Herbert Darrell  
Bomar, Petitioners, pray that an order be entered



recalling and staying the mandate and staying the order of extradition of the United States Court of Appeals for the Fifth Circuit pending the filing of a petition for certiorari and a final determination of this matter by the Court. In support of this application, Petitioners respectfully show the following:

1. Parties: Petitioners are citizens of the State of Texas. Respondent, the State of Minnesota, seeks to extradite Petitioners with the cooperation of the State of Texas and Bill Burrows, Sheriff of Wichita County, Texas, Respondents, to Minnesota for criminal prosecution of alleged security violations.

2. State Court Proceedings: Petitioners were arrested in Wichita County, Texas on March 31, 1981 pursuant to a fugitive warrant issued by the State of Minnesota. Petitioners were discharged from custody on August 31, 1981 because no extradition warrant had been issued. The Governor of Texas issued an extradition warrant

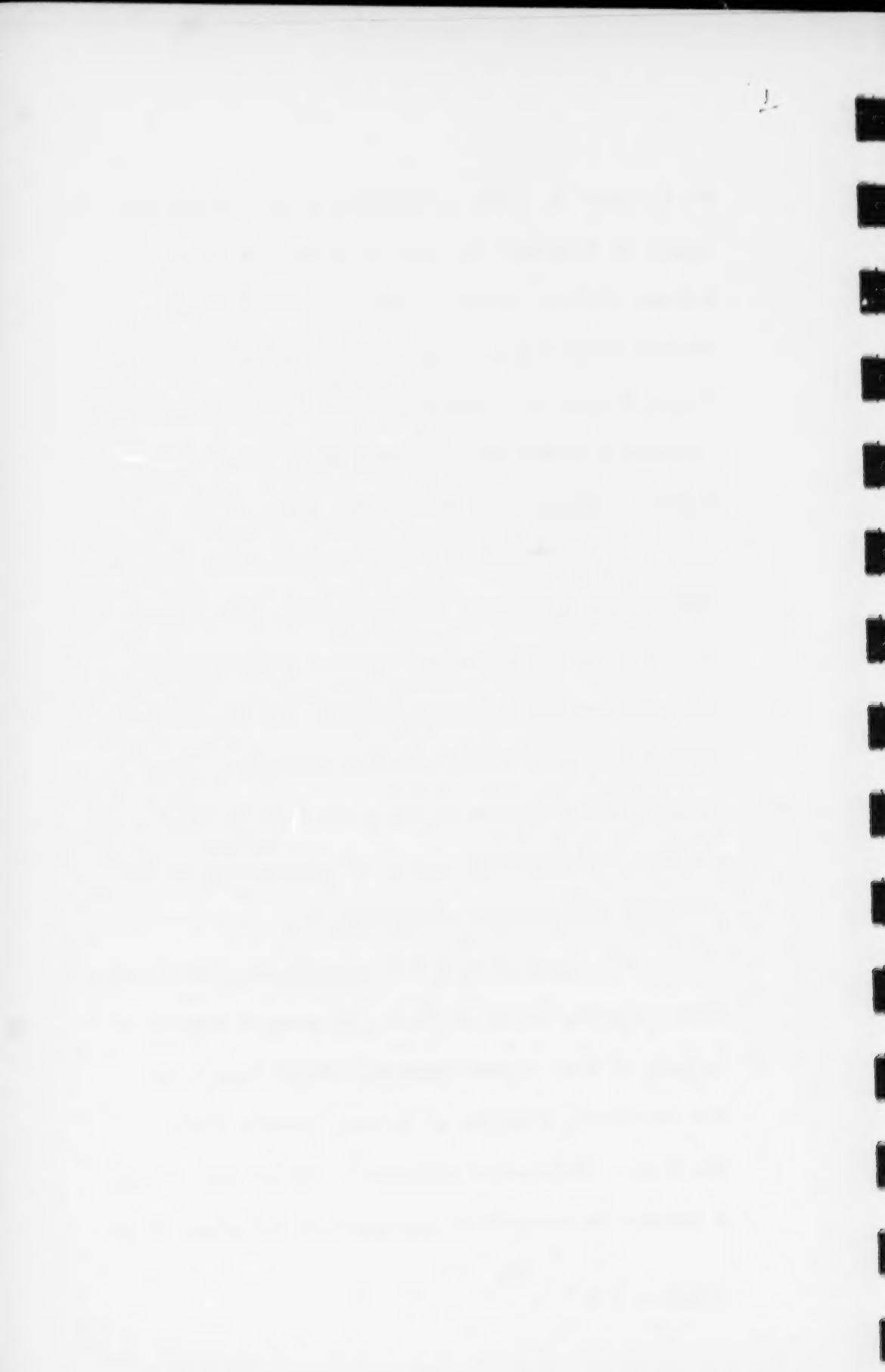


on October 1, 1981. Petitioners were arrested again on October 23, 1981 and sought state court habeas corpus relief. The state trial court denied Petitioners habeas corpus relief. The Texas Court of Appeals for the Second Supreme Judicial District affirmed the state trial court's judgment on March 24, 1982.

Ex Parte McDonald, 631 S.W.2d 222 (Tex. Ct. App. 1982) (See Exhibit A for opinion). The Texas Court of Criminal Appeals denied Petitioners request for discretionary review and the United States Supreme Court refused certiorari. The questions for review to be presented in the petition for certiorari were not presented in the previous petition for certiorari.

3. Federal Court Proceedings: Petitioners subsequently filed petitions for writ of habeas corpus in the United States District Court for the Northern District of Texas, Wichita Falls Division. Petitioner, Orison F. McDonald, II, is a debtor in possession pursuant to Chapter 11 of





the Bankruptcy Code. Petitioner McDonald filed related actions in the United States Bankruptcy Court for the Northern District of Texas, Wichita Falls Division, which were transferred to the District Court and consolidated with the petitions for habeas corpus. The United States District Court denied relief for the Petitioners. On May 7, 1984, the United States Court of Appeals for the Fifth Circuit affirmed the District Court judgment. (See Exhibit B for opinion).

4. Application for Stay in Lower Court:

The United States Court of Appeals for the Fifth Circuit denied Petitioners' motion for stay of the issuance of the mandate and issued the mandate on May 31, 1984. (See Exhibit C). On June 7, 1984, Respondent filed an application for transfer of Petitioners pursuant to Supreme Court Rule 41: Custody of Prisoners in Habeas Corpus Proceedings. On June 8, 1984, the Clerk for the Fifth Circuit issued a notice stating that the

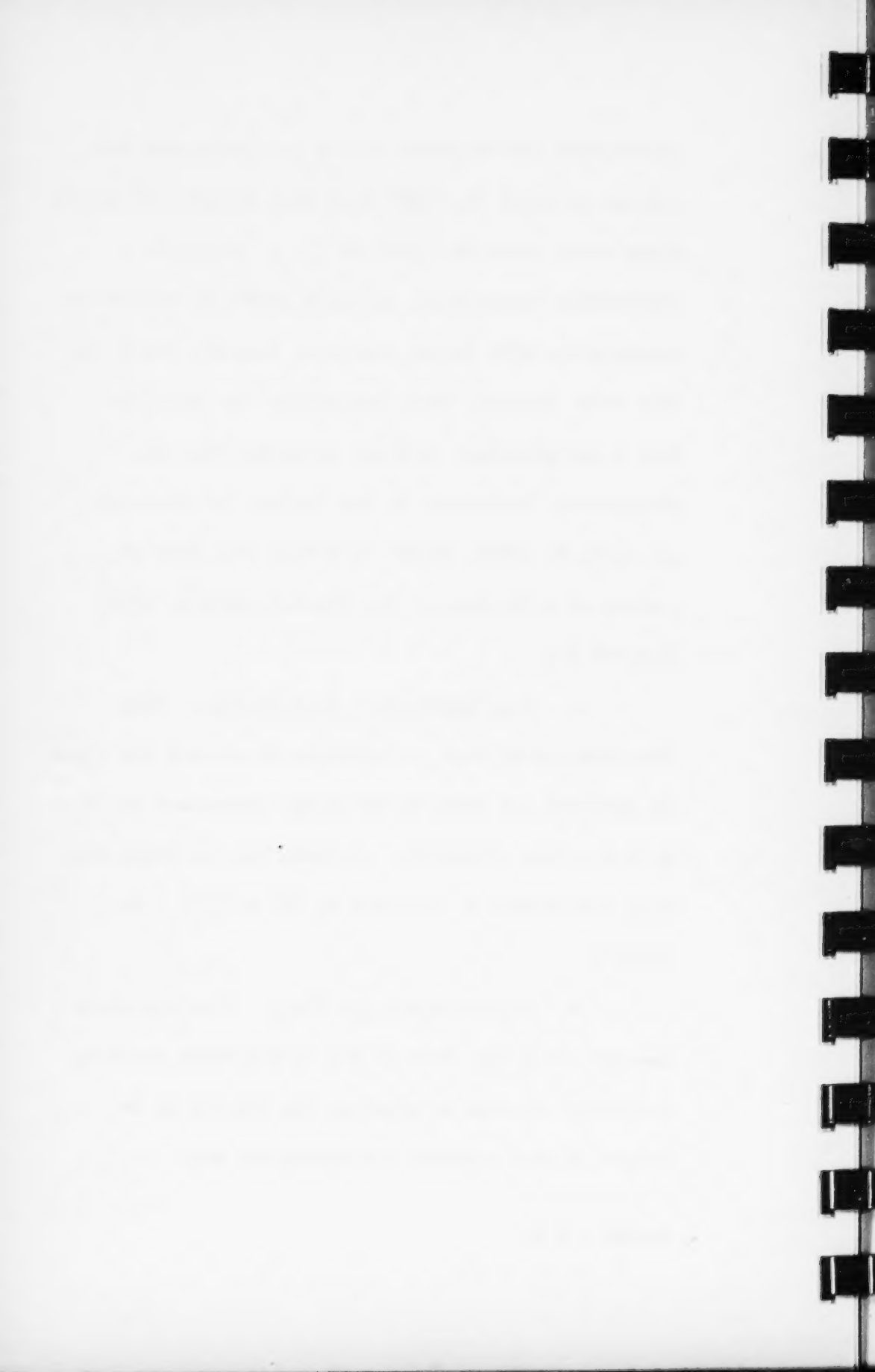


application for transfer would be presented for ruling on June 15, 1984 and that Appellants would have until June 15, 1984 to file a response.

Petitioners learned on June 13, 1984 by telephone conference with Susan Vaughn, Deputy Clerk for the Fifth Circuit, that the motion for transfer had been granted, without consideration of Petitioners' response to the motion for transfer, on June 8, 1984, which is before the date of ruling as provided in the Clerk's notice. (See Exhibit D).

5. Supreme Court Jurisdiction: The Supreme Court has jurisdiction to review the case on petition for writ of certiorari pursuant to 28 U.S.C., Sec. 1254(1). Jurisdiction to issue the stay requested is granted by 28 U.S.C., Sec. 2101(f).

6. Justification for Stay: The standard for granting the stay of the extradition pending certiorari review is whether the issues to be raised in the petition for certiorari are



"sufficiently debatable to lead to the belief that at least four members of the Court would vote to grant certiorari". Edwards v. United States, 76 S.Ct. 1058, 1 L.Ed.2d 17. Petitioners propose to submit two questions for review in their petition for certiorari which justify the stay of the extradition:

(a) Petitioners have alleged throughout their extradition proceedings that the Petitioners were denied due process due to the delays in their extradition proceedings. The ruling of the Fifth Circuit is that Petitioners are not entitled to assert their rights to due process in an extradition hearing. Petitioners contend that the fundamental right of due process may be asserted in any hearing which could result in the deprivation of liberty. Extradition involves a substantial loss of liberty; therefore, one should be entitled to assert



his due process rights in the extradition hearing.

(b) Petitioners throughout the extradition proceedings have asserted that the extradition should not be granted due to the bad faith motives of the Minnesota prosecutors in seeking extradition. Petitioners are attempting to defend themselves in security lawsuits from individuals residing in the State of Minnesota and are attempting to administer their debts pursuant to the Bankruptcy Code. Petitioners' right to effective access to judicial process is protected by the immunity and privileges clause, the right to petition for redress of grievances pursuant to the First Amendment, and the right to due process pursuant to the Fourteenth Amendment. It is Petitioners' contention that extradition should not be granted when the motive of the





demanding state is to interfere with the constitutionally protected rights of Petitioners of effective access to judicial process.

7. Mootness: Should Petitioners be extradited to Minnesota, the issues to be presented in a petition for writ of certiorari will become moot. Petitioners intend to assert substantial and novel questions in their petition for certiorari and should not be denied review before this Court. Should the opinion of the Fifth Circuit Court of Appeals be accepted as law, citizens residing in the Fifth Circuit will not have any due process rights, nor the right to protect their constitutional right to judicial process, in the extradition context. In essence, individuals in extradition proceedings will have no rights.

8. No Prejudice to Respondents: Neither the State of Texas, nor the State of Minnesota,



will be prejudiced by the granting of the stay. Should the Supreme Court rule against the Petitioners, the State of Texas will still have the opportunity to extradite Petitioners and the State of Minnesota will still have the opportunity to prosecute Petitioners.

WHEREFORE, Petitioners pray that the judgment and mandate of the Court of Appeals for the Fifth Circuit which issued on May 31, 1984 be recalled and stayed and that the Order for Transfer of Petitioners be stayed pending the timely filing of a petition for writ of certiorari and a final determination of the matter by the Court.

Respectfully submitted,

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